OCTOBER TERM, 1948

No. 610

ROBERT AUSTIN WATTS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR RESPONDENT

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Opinion of Court Below

The opinion of the Supreme Court of Indiana has not yet been reported officially. It may be found, however, in 82 N. E. (2), 846, and at pages 37-42 of the printed record in the Supreme Court of the United States.

Jurisdiction

The judgment of the Supreme Court of Indiana to be reviewed in this case was entered December 29, 1948. Petition for rehearing denied January 11, 1949. The petition for a writ of certiorari was filed on the 14th day of February, 1949. The jurisdiction of this Court is invoked under the provisions of Section 1257, 28 United States Code.

Questions Presented

A. Whether the trial and conviction of the petitioner was upon an indictment found and returned by a grand jury on which negro members had been excluded solely on account of race or color pursuant to an established systematic and continuous practice, in denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (It is to be noted that the Supreme Court of Indiana decided this point as a question of local procedure. In the lower court an attempt was made to present this question by the device of a motion to quash but the Supreme Court of Indiana ruled that it could only be raised by a plea in abatement.)

B. Whether the confessions of petitioner to State officers was obtained through the use of force, duress, and intimidation and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of Facts

The grand jury of Marion County, Indiana on the 19th day of November, 1947 returned an indictment against petitioner in two counts:

Count 1. Murder in the first degree of Mary Lois Burney.

Count 2. Murder while in an attempt to perpetuate a rape of the one Mary Lois Burney.

Petitioner was arraigned in the Marion Criminal Court on the 22nd day of November, 1947. He entered a plea of not guilty to each count of the indictment and then reserved the right to file any pleadings and reserved the right to change his plea. Upon motion of the petitioner the venue of the action was changed to Shelby County. (Tr. p. 15, 11. 1 to 17). Petitioner then filed a verified

plea of insanity. State filed a Reply in General Denial to said special plea of insanity. Court then granted petitioner's request to withdraw plea of guilty. Whereupon petitioner filed his motion to quash the indictment and each count thereof. After hearing evidence upon petitioner's motion to quash the indictment the Court overruled the same. (Tr. p. 36, l. 27 to p. 37, l. 2) (The evidence at this hearing is to be found in Tr. p. 100 to p. 150 and p. 3 to p. 30 of Transcript of Record). Tr. pp. 12, 13, 23, 24, 28-29, 31-32.

The reason urged by petitioner for the sustaining of his motion to quash was that in the selection of the grand jury, which returned this indictment, negroes were excluded from service because of their race and color.

During the trial petitioner objected to the introduction in evidence of certain written statements allegedly made and signed by petitioner, same being State's Exhibits 26, 27, and 28. Exhibits 26 and 28 are identical except 26 is typewritten and 28 is in longhand. These two exhibits are oral statements made by petitioner to police and then by police written up and later typed. Exhibit 27 is practically the same but stated to the Prosecutor who had same typed. All were read and signed by petitioner, objection to these exhibits being on the ground that same were obtained from petitioner through the use of force, duress and intimidation. Out of the presence and hearing of the jury the trial court accorded a full hearing on the issues presented by the objection. Petitioner's evidence was to the effect that he was not guilty, and that prior to his confession or statement he had been beaten, starved, threatened and otherwise abused to such an extent that he signed the written statements, State's Exhibits 26, 27 and 28 under the influence of fear. These statements were to the effect that he did not kill Mary Lois Burney, the deceased, but that in a struggle with her in an attempt to take the shot gun from her it

accidentally went off shooting her in the neck and face. The petitioner's evidence was contradicted in detail by various witnesses who testified for the State. The trial court overruled the objection of petitioner (Tr. p. 360 to tr. p. 769).

By virtue of Section 9-1706 Burns 1933, 1942 Replacement, the trial court saw fit, before trial, to have petitioner examined by physicians as to his sanity.

The trial began on the 12th day of January, 1948 and ended on the 28th day of January, 1948 when the jury returned a verdict finding the petitioner herein guilty of Murder in the First Degree while attempting to perpetrate the crime of Rape and fixing the punishment therefor to be death in the electric chair, and the petitioner by the trial court was so sentenced. Petitioner entered an appeal to the Supreme Court of Indiana. Thereafter, following a complete and full hearing the Supreme Court of Indiana on December 29, 1948 affirmed the judgment of the trial court.

The material facts concerned the question of exclusion of negroes from grand jury service as well as the facts pertaining to the admissibility of the confessions or statements of petitioner to State authorities, to-wit, Exhibits 26, 27 and 28 which are set forth and discussed in the argument herein.

Argument

I

The record in this case fails to substantiate petitioner's claims that negroes were systematically and intentionally excluded from the grand jury which indicted him in violation of the Fourteenth Amendment to the Federal Constitution and the decisions of this Court.

1

The objection presented by petitioner's first assignment of error was not properly presented to the trial court and

to the Supreme Court of the State of Indiana and therefore no question of a federal nature is before this Court.

Petitioner's objection to the grand jury was by Motion to Quash.

Irregularity in the selection, impaneling or swearing of the grand jury cannot under Indiana procedure be presented by a Motion to Quash but should be presented by Plea in Abatement.

Swain v. *State* (1938), 215 Ind. 259, 18 N. E. (2) 92;
Steinbarger v. *State* (1937), 214 Ind. 36, 14 N. E. (2) 533;
Bottorff v. *State* (1927), 199 Ind. 540, 156 N. E. 555;
Katzen v. *State* (1922), 192 Ind. 476, 137 N. E. 29;
State v. *Jackson* (1918), 187 Ind. 694, 121 N. E. 114.

The statute specifies the ground available for a motion to quash an indictment and nothing outside of the grounds specified is available.

Katzen v. *State, supra;*
State v. *Jackson, supra.*

Section 9-1129 Burns 1933, 1942 Replacement (Acts 1905, Chapter 169, Section 194, page 584), provides:

"The defendant may move to quash the indictment or affidavit when it appears upon the face thereof either:

"First. That the grand jury which found the indictment had no legal authority to inquire into the offense charged.

"Second. That the facts stated in the indictment or affidavit do not constitute a public offense.

"Third. That the indictment or affidavit contains any matter which, if true, would constitute a legal justifica-

tion of the offense charged, or other legal bar to the prosecution.

"Fourth. That the indictment or affidavit does not state the offense with sufficient certainty."

In the case of *Stipp* v. *State* (1917), 187 Ind. 211, 118 N. E. 818 it was said:

"* * * It is true, as stated in 12 R. C. L. 1032, § 19, that: 'If the accused knew that his case would be presented to the grand jury because he had been committed to await its action, he must * * * object to defects in the grand jury's organization by challenge to the polls or to the array. But if he was not in custody or out on bail at the time the grand jury was impaneled, and so had no knowledge that his case would go before the grand jury, and consequently no opportunity to object to its organization before the indictment was found against him, he may make his objection by plea in abatement.'"

See also:

Hitch v. *State* (1936), 210 Ind. 588, 4 N. E. (2) 184;
State v. *Bass* (1935), 210 Ind. 181, 1 N. E. (2) 927;
Mershon v. *State* (1875), 51 Ind. 14.

2.

The record in this case fails to substantiate petitioner's claims that negroes were systematically and intentionally excluded from the grand jury which indicted him in violation of the Fourteenth Amendment to the Federal Constitution and the decisions of this Court.

The Supreme Court of Indiana has never failed to recognize the binding force of the decisions of this Court in:

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;
Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567;

Bush v. *Kentucky*, 107 U. S. 110, 27 L. Ed. 354;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Rogers v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417;
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500;
Hale v. *Kentucky*, 303 U. S. 613, 82 L. Ed. 1050;
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Smith v. *Texas*, 311 U. S. 128, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692;
Patton v. *Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164.

In the case of *State* v. *Bass*, 210 Ind. 181 *supra*, the Supreme Court said:

> "From the earliest times rules and methods have been devised for drawing juries in an effort to insure the selection of disinterested jurors, and with a view to preserving the purity of the jury as an institution. Our statutory method of drawing juries was devised for the purpose of putting the selection beyond suspicion of advantage or favoritism. This result can be achieved only by a strict conformance to the requirements of the statute. The statute, section 4-3304, Burns' Ann. St. 1933, section 1267, Baldwin's 1934, clearly contemplates that no names shall be contained in the jury box, except the names taken from the tax duplicate by the jury commissioners to serve the courts for the current year. The facts alleged, which are by the demurrers admitted to be true, disclose that there were names in the jury box which should not have been there. It is alleged that there was opportunity for names to be inserted in the box by others than the jury commissioners; that the names of two who were active in seeking an investigation of the matters involved in the indictment were in the box. This may have been a mere coincidence, but it furnishes ground for suspicion, and the impartiality of

> juries must be above suspicion insofar as a compliance with the statutory method of selection can make it so. It is for this reason that a grand jury which is not organized in accordance with the statutory requirements is held to be an unlawful jury, and an indictment returned by such a grand jury *will be abated.* * * *" (Our italics)

In the case of *Dixon* v. *State* (1946), 224 Ind. 327, 67 N. E. (2) 138 the appellant filed his written challenge to the entire array of prospective petit jurors, alleging in substance that Sections 4-3301 to 4-3319 Burns 1933, pertaining to grand and petit jurors, were so administered in Vanderburgh County by the administrative officers who are chosen to select the names that are placed in the jury box and who draw the names therefrom, that the names of no negroes are placed in the jury box, or at least no such names are drawn therefrom, and that thereby appellant's rights under the Fourteenth Amendment as a negro being tried for a major felony are effectually destroyed. After quoting from various decisions of the Supreme Court of the United States the Supreme Court of Indiana said:

> "When, as in this case, a claim is properly and timely asserted that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our duty to make inquiry and determination of the facts presented in support of the claim, for equal protection to all is the basic principle upon which justice under law rests. *Pierre* v. *State of Louisiana, supra* (Head note 2, p. 358, of 306 U. S., 59 S. Ct. at page 538, 83 L. Ed. 757). Equal protection of the laws is more than an abstract right. It is a command which the state must protect, the benefits of which every person may demand. It is a safeguard of our constitution which extends to all—the least deserving as well as the most virtuous. * * *
>
> * * * * * * *

"We are, like the jury commissioner who testified, at a loss to know why, during the period under inquiry, no negro was ever drawn for jury service. Nor can we understand why the one jury subpoena for a negro which came to the special deputy sheriff for service during this period, turned out to be for a dead man. With every opportunity to show how this occurred, the State was content to rely upon the idea that it was merely coincidental, or 'for no particular reason' as stated by the jury commissioner who testified. However, it remains an undisputed fact. Whether the jury commissioners intended to discriminate against negroes or not, their action has resulted in a noticeable discrimination. A similar case from the same county was before this court in a *coram nobis* proceeding in *Swain* v. *State* (1939), 215 Ind. 259, 18 N. E. (2d) 921. The evidence before the court in that case showed that some negroes had been drawn on juries in the courts of the county during the period then under investigation, and this court held that the evidence did 'not establish that clear showing of error of fact that would justify us in disturbing the exercise of the trial court's discretion.' In the instant case the question was properly and timely raised and presented. The trial on the challenge to the entire array of jurors was had and determined by the court, prior to the hearing of the case on its merits. No question as to the guilt or innocence of the defendant is presented. His guilt or innocence cannot affect his constitutional right to 'due process' and 'equal protection' of the law. *Hill* v. *Texas*, supra (Head note 2, p. 406, of 316 U. S. at page 1162 of 62 S. Ct., 86 L. Ed. 1559); *Tumey* v. *State of Ohio* (1926), 273 U. S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749, 759, 50 A. L. R. 1243.

"We find no evidence in the record, and no inference that can be properly drawn from the evidence to support the court's ruling. We are convinced the court's ruling is in conflict with that part of § 1 of the Fourteenth Amendment to the Federal Constitution hereinbefore quoted, and with § 44, 8 U. S. C. A. also quoted

herein, and that this ruling deprived appellant of his liberty without due process of law and denied him the equal protection of the laws.

"For this error the cause is reversed with instruction to the lower court to sustain appellant's motion for new trial and for further action agreeable with this opinion."

We respectfully submit that the evidence in the instant case is not such as to establish that clear showing of fact that would justify this Court in disturbing the determination of fact made by the trial court which the Supreme Court of Indiana held to be supported by sufficient evidence.

If it can be said, which we sincerely doubt, that petitioner presented a prima facie case we respectfully submit that the State's evidence was such as to rebut same; that there was ample evidence to support the finding of the trial court.

In brief the evidence is as follows:

Scotty Scott, petitioner's witness, testified that: He resided in Marion County for seventeen years. That he works for a newspaper in Indianapolis. That he did not know of any occasion of negroes serving on the grand jury during his seventeen years of residence. That there are negroes who are property holders competent to serve. That there are by the last estimate of the Chamber of Commerce 65,000 negroes in Marion County. That the general population of the county is about 486,000. That he does not know how grand jurors are selected. Never attended a drawing. Did not know of any discrimination. Did not know if negroes were ever selected and called to serve. That he did not recall having any negro tell him he had been called. Never examined the list to see if negroes ever did serve. Did not know from own knowledge if negroes were probably excluded from the list drawn. Tr. (pr) 4-6, 7.

Thomas Ervin, petitioner's witness, testified that he lived in Marion County twenty-one years and that he had no

knowledge that during that period of time negroes had ever served on grand juries.

William S. Henry, witness for petitioner, testified he resided in Marion County forty-four years. That he had no knowledge of a negro ever having served on a grand jury in the last twenty-five years. Knew of negroes who owned property. That there are between sixty and seventy thousand negroes in Marion County. General population about 486,000. That he has been a lawyer for some thirty-one years and would have particularly known if negroes had served. That a grand jury is chosen twice a year and there are six persons on a grand jury. Has no actual proof of discrimination but it is per se discrimination if there be colored people qualified to serve and are not called. Was not present at the selection of this grand jury. Does not know of his own knowledge that negroes were called and questioned but would gamble that they were not. Never made any investigation to find out if negroes were ever called. (Note that Mr. Henry was attorney for the defense.) Tr. (pr) 8-10.

Al Magenheimer, witness for petitioner, testified he was the sheriff of the county. That he had no knowledge of negroes serving on grand juries in the last twenty-five years. That he also had no knowledge that they had not served. Tr. (pr) 10-12.

Glenn Parish, witness for petitioner, testified that he lived in Marion County for fifty years; that he is deputy clerk, Marion County. That he had no knowledge that within the last twenty-five years negroes served on grand juries. That six persons serve on grand jury and serve for one term of court for six months. That there are two terms—twelve jurors a year. That the names are drawn from a box by the jury commissioners. That each juror's name is written out as drawn. The jury can get the names from the tax

list which includes all the taxpayers of Marion County. That he has seen the tax duplicates. That it does not show thereon whether a person is black or white. He has no evidence of discrimination on the part of the jury commissioners. That actually the county clerk draws out the names from the jury box. That the box is shaken up and then a name drawn out and written down. That there are a good many colored people's names in the box. He has seen that happen many times. Was present the last time a jury was drawn and colored people were drawn and selected. That seventy-five names are drawn at a given time. That the judges of the criminal court appoint the grand jury. Seventy-five drawn in this case—no negro was chosen. Didn't know of his own knowledge if negroes had not served. Doesn't know either way. Can only tell if colored people have been selected and called when they come into court room. That the prosecutor assists in looking up information. That the prosecutor has no authority to pick the jury—assists in advising the court, the same as the clerk or any of them. The court being duly advised acts in certain ways. Tr. (pr) 12-17.

Judson L. Stark, witness for petitioner, testified that he had been a resident of Marion County about twenty-five years. That he didn't know how many negro or colored persons have served on the grand jury, and that he didn't know how many have been called or served during that time, and that he was acquainted with a lot of colored people, and that there are about 65,000 in Marion County, the total population of which is about one-half million. The courts in Marion County by statute hold two terms per year. That that is not true of all courts, but it is of Marion County. The terms run from January 1 to June 30 and then from July 1 to December 31. At the beginning of each six months term, or prior thereto, as a matter of fact in order to select the regular panel for the grand jury and petit jury, the

jury commissioners, upon order of the judge or judges, select, pursuant to law, names to go into a jury box. They select a rather large number. The law has from time to time varied on that subject. The names are selected without regard as to whether they are white or colored. They put them in the jury box; then on the day appointed as provided in the order and pursuant to law, the county clerk takes the box, which is under lock and key (each jury commissioner has a key so that neither can get into it alone). He shakes that around thoroughly, then the jury commissioners open it. The county clerk sticks his hand in and just draws out one name from the box containing a large number of names, both white and colored, and the first name drawn out is written down. Then number two, three, four, five—until about seventy-five, whatever the court has ordered, is drawn. That's the prospective grand jury list. Then they continue until about two hundred names are drawn to make up the regular panel; that is the first panel. Subpoenas are gotten out for those names, ordering them to appear at a given time as prospective grand jurors. When they come to the court room, the two judges sit at the table and the clerk calls the first name; the name of that man goes into the box, it doesn't matter who he is; then they call number two, three, four, five, six. Then the judges begin questioning them to see whether or not they are qualified under the statute to serve as grand jurors. Tr. (pr) 17-28.

There are several reasons that could excuse them. Sometimes one of them will say he is ill, or that his wife is ill, and there are various and sundry other reasons why the court, at its discretion, may excuse one from grand jury service. It is not uncommon to hear pleas of legitimate nature to be released. The prosecuting attorney has no power whatsoever to do any of that. It is true that they have from time to time looked up the qualifications and run the records on names so as to be sure they don't get anyone with bad

background in there. Any information of that kind is gotten at the request of the judge. Otherwise, the prosecuting attorney has nothing whatsoever to do with the selection of the grand jury. He further testified that the selection of the grand jury in the *Watts* case was done regularly and that he was not personally present but that his deputies were, and that he couldn't tell how many names are in the box at the time the names of the grand jurors were drawn, and that he saw the grand jury that was chosen for Robert Watts— there were no negroes on it.

State's Evidence

Judson L. Stark testified that he was the prosecuting attorney of Marion County. That he was the same Judson Stark who testified as witness for petitioner and that he had previously been deputy prosecutor and judge of Marion Superior Court Room #1. That in his official capacity he became familiar with the method of selecting grand jurors in Marion County. There never has been any discrimination or effort to keep names out of the box or keep any colored person in Marion County from serving on either grand or petit jury. That he knew personally that in the last three years three negroes were called, names are drawn from the same box as for the petit jury, and that he knew they have been called and put in the jury box. Was prosecutor when this last grand jury was selected. They were selected in July. His deputy was present. Seventy-five persons were selected from the box, from which is drawn the panel of the grand jury. He did know there were names of colored persons in the box and that they were drawn out. When asked "But you do know that when it came time to make the final selection that it was very convenient for the colored names to be eliminated?", he replied "No, I don't know. It isn't even the truth." The court makes the selection. He testified that he didn't

know why they were excused but did know that finally, when finished, the jury did not have any colored person on it. He didn't know if a colored man ever served on grand jury and had not seen all of them and that it would not surprise him if one had, he would not necessarily know if a colored man ever served on a grand jury. He would just as soon have a colored man on that as a white man. The prosecutor has nothing to say about who is really selected. Make some investigations and then only if anything is very bad. They do run some records. Tr. (pr) 22-28.

Glenn Funk, chief deputy prosecuting attorney since March 1, 1947, testified that names of grand jurors are taken from a list of the taxpayers of Marion County, placed in a jury box and from that box the names are drawn, and that he did know of negroes or colored persons drawn for the grand jury. Two were called in January term, 1948. They did not serve. They asked to be excused. He was present at the selection. The two colored persons were in the jury box. I heard what they said to the judge. Tr. (pr) 28-30.

Cross-examination: Lived in the county twenty-one years. To his knowledge no colored man has served on the grand jury.

From the above it is to be seen that no positive evidence was given by petitioner in support of his claim herein. The negative evidence is such as to bear no weight.

Sec. 4-3301, Burns 1933, 1946 Replacement (Acts of 1881, Ch. 69, Sec. 1, p. 557, Acts 1889, Ch. 195, Sec. 1, p. 438) provides for the appointment of jury commissioners—their oath—instruction.

Section 4-3302 of Burns provides who are ineligible to act as commissioners.

Section 4-3304 Burns (Acts 1881, Ch. 69, Sec. 2, p. 557, Acts 1939, Ch. 132, Sec. 1, p. 656, Acts 1947, Ch. 15, Sec. 1, p. 58) provides for the selection of grand and petit jurors

and special procedure in counties exceeding 400,000 population and is as follows:

"Said commissioners shall immediately, from the names of legal voters and citizens of the United States on the tax duplicate and the tax schedules in the assessor's office of the county for the current year, examine for the purpose of determining the sex, age and identity of prospective jurors, proceed to select and deposit, in a box furnished by the clerk for that purpose, the names, written on separate slips of paper, of uniform shape, size and color, of twice as many persons as will be required by law for grand and petit jurors in the courts of the county, for all the terms of such courts, to commence within the calendar year next ensuing. Such selection shall be made as nearly as may be in equal numbers from each county commissioners' district. In making such selections, they shall in all things observe their oath, and they shall not select the name of any person who is not a voter of the county, or who is not either a freeholder or householder, or who is to them known to be interested in or has a cause pending which may be tried by a jury to be drawn from the names so selected. They shall deliver the box, locked, to the clerk of the circuit court, after having deposited therein the names as herein directed. The key shall be retained by one of the commissioners, ~~not an adherent of the same political party as is the clerk.~~"

Section 4-3306 provides the method of drawing grand and petit jurors and is as follows:

"At 10 o'clock A. M. on the Monday immediately preceding the commencement of any term of any criminal court, or circuit court where there is no criminal court authorized, the clerk, having first well shaken the box, shall open the same in his office, and publicly draw therefrom six (6) names of competent persons, who shall be summoned as the grand jury for such ensuing term; and he shall issue a venire therefor as the court or judge, in vacation, may direct. He shall,

at the time of drawing such grand jury, enter a list of the names so drawn upon the order-book of the court, and annex his certificate of the fact. He shall also, within the same period preceding any term of the circuit, superior or criminal court, in the same manner, draw for each of such courts, respectively, twelve (12) names of persons as petit jurors for such courts, respectively, at such terms; and he shall record and certify such drawing upon the proper order-books of such courts, respectively, as is required concerning the grand jury; and he shall issue venires for such juries as such courts, or the judges thereof in vacation, may direct. In counties where the superior court may have more than one (1) judge, said clerk shall, if so directed by such court or judges, in like manner, draw one or more additional petit juries for such court at any term. After a petit jury has served four (4) weeks during any term of court, such court may, in its discretion, discharge it, and direct the clerk in the same manner, at any time, to draw another petit jury, and summon the same."

II

The confessions, State's exhibits 26, 27 and 28, were not obtained through use of force, duress and intimidation on the part of State Officers and therefore the lower court did not commit error in ruling that same was admissible in evidence.

1

In the case of *Johnson* v. *State* (1948) Ind., 78 N. E. (2) 158, the Indiana Supreme Court said that in determining whether defendant's rights under the due process clause of the Federal Constitution were violated by admission of a confession, it was required to follow what had been determined on the question by the United States Supreme Court. Therein, the Court said at page 160, "We can not permit this judgment to stand if the undisputed evidence suggests

that force or coercion was used to exact the confession even though without the confession there might have been sufficient evidence for submission to the jury. *Malenski* v. *New York*, 324 U. S. 401, 65 Sup. Ct.; *Haley* v. *Ohio*, 68 Sup. Ct. 30," • • • We are bound by, and must follow, what has been determined as to this question by the Supreme Court of the United States. We regard the cases of *Haley* v. *Ohio*, *supra*, and *Malenski* v. *New York*, *supra*, as controlling and upon these cases we base this opinion. According to the principles of law as laid down in these two cases as well as in the cases cited in those opinions it was error to admit the involved confession."

In the instant case it can not be said that the evidence is undisputed but as a matter of fact was contradicted in detail by various witnesses who testified for the State.

In brief the testimony of petitioner was as follows: Arrested November 12, 12:30 P. M. at the Indianapolis City Garage, Asphalt Company by Mr. Reasner, Deputy Sheriff. Was at work at time driving a truck. Went to County jail. Was questioned at State Police Headquarters at quarter till 12 same night in regards the Mary Lois Burney murder. From time of arrest until he went to State Police Headquarters was confined in solitary confinement which is called "the hole" in Marion County Jail. Got bread and water every second day until he signed a statement. Before arriving at State Police Headquarters did not get anything. Place of confinement was an iron cell 10 x 12—little cubby hole in the door—no bed in it—just a toilet—no light—floor of steel sheeting—walls of steel. Did not even get water until arrival at State Police Headquarters. Orders were not to give me any. Clothes were taken away from him. He was given a pair of overalls every time State Police took him out. No heat in there—it was cold in there. Was not told what he was arrested for. Simply asked me when I did any shooting lately. At jail the sheriff although he knew

me and my name all the time asked me my name. Took him to where Mrs. Stout was. She said that was the man. Sheriff shook his head. Grabbed by two deputies—one was Reasner—and rushed out to Reasner's office and then to "the hole". Reasner took me to "hole". At quarter of 12 was taken out. Was thrown a pair of overalls. Practically every deputy sheriff Mageuheimer had down there was unfastening his collar and loosening his black jack trying to threaten him—about 13 or 14 of them. One was Reasner, the other Arns. They had guns on them—they took off their coats, tried to tempt me—Sheriff questioned me then State Police came. Sheriff was the only one who said anything to me. Mr. Shields, (State Policeman) Reasner and about six State Police took me to State Police Headquarters in their cars. Had on handcuffs. At State Police Headquarters was questioned by Shields and Reasner about Mrs. Burney. Later questioned by Major O'Neal and others. Told them he did not even know the woman. *Told them I was willing to take the lie detector.* Was taken to lie detector. Sat on the detector taking test from 2 A. M. till 5:30. No one present but officer giving test. *I told him I did not object to taking the test.* At end of the test the officer said, "I'm convinced that you didn't kill Mrs. Burney, but you know who did. The lie detector says you're holding back something." Told him he did not kill anyone and no use to talk to him about it. Mr. Shields came in, took me upstairs. Introduced to Captain Barton. Was questioned about the murder. *Told Barton if he would come after me would take him to every person's house I've been in in Indianapolis.* They sent a car after me about 9:30 in the morning. *Rode around all day.* Shields and Reasner took me back to jail at 6:30 A. M. (back from Police Headquarters—not from trip around town). Had nothing to eat up to this time. Was hungry. Had no sleep. Taken back to "the hole". On way to jail said to Bob Reasner "*What's the idea, trying*

to get me connected with a murder. You told me you just wanted to see me and now you got me tied up with four or five murders. He said "Well Bob, I'm just a police officer taking orders." In the morning was taken out of cell and out in lobby. They had some women come in. Don't know what they were there for but said "it was me, me, me." They were white people. There about 5:00. Then state police came, three of them. They wanted me to take them every place I had been in Indianapolis. It was about 9:30 A. M. Which I did. *I didn't have any objections.* I didn't have anything to hide. Still did not have anything to eat or drink. Just went around Indianapolis. Stopped at homes. Several homes of women. Police didn't talk to me. They only wanted to know my daily routine on November 12th. Took them out to Betty Cracraft's (Mrs. Stout) house. Told them I was to go by her house—that she was the woman I was supposed to attack that day. After leaving her house I told them I went home. He asked me did I have anything with me or anybody with me. I asked him did he want to know the truth about it. He said yes. *I said yes, I had a shotgun.* He said what time was that. I said between 9:30 and 10:00 A. M. They wanted to know about the gun. Told them I had the gun but would not take them to where it was. They radioed in. A broadcast came over the radio to bring the prisoner into State Police Headquarters. At homes we called at the women said "Yes I have seen him before but what you're talking about, he never did bother me." When we got to Mrs. Stout's, Thursday afternoon, is when they radioed to come in. Got back to State Police Headquarters in afternoon. Sat in room alone for about one hour and twenty minutes. Then was questioned by Captain Barton. *He gave me a cigarette, fed me a whole lot of junk* and expected me to tell that I killed Mrs. Burney. Was questioned about the gun. Told me if I would tell where the gun was he would see the prosecutor

and get me off on second degree murder and manslaughter and a whole lot of stuff. Told him I was not scared to talk about the gun—that the gun was given to me to keep for four or five days. *Told him I did not object to going back on lie detector.* Police got mad—moved me to another room and started taking turns slapping me around. A large number of them—every policeman they got down there. Major O'Neal had some kind of a rubber smacker. Slapped me on the side of my face, my nose started bleeding. Was hit by O'Neal in face, shoulder and on back. Was hit by Captain Barton who said "If we have to break you down this way we will." Barton used his hands. Was kicked in the side by Barton. Then the police took turns—all of them, pushing and slapping me around. They would ask who killed Mrs. Burney and then start in beating again. It went on clear up until 11:30 or 12:00 o'clock that night. Went in this room in the afternoon. All the time was handcuffed. Still nothing to eat or drink, now second or third day without food. Then Captain Barton said they didn't want to get hard with me but just a matter of reasoning they had to sometimes. He then brought a coke. That was midnight and the first I had to eat or drink since arrest. Was weak and hungry. Was questioned about Mrs. Stout. Taken back to jail at about 6:30 A. M. by Shields and Reasner. Nothing said except Reasner remarked about the boys getting rough. Was put back in "the hole." Still had no sleep since arrest. About 8:30 or 9:00 was taken to grand jury room. Been up day and night. There was Fred Lynch, a fellow I worked with at the City Asphalt Company. He was a big politician. Talked to me about all the unsolved murders. Told him I didn't have anything to do with them. He said he didn't think so either. He said he tried like everything to see me but they wouldn't let him—that he knew the prosecutor and the prosecutor got him to come over. Then taken back to jail. Soon Mr. Shields and

Reasner and practically every state police car they got on the force came and took me out in search of a hat or coat I had thrown away. I sat in the car—police made the search in the weeds. Police got cold and then mad. They called me lies and everything. *Didn't take any interest in it or what they said* because I knew I didn't kill anyone. Taken to State Police Headquarters. O'Neal and Shields and Reasner were along. At State Police they talked about the murder. *I was not interested in it* so don't remember all that was said. *Was not worried about it.* Was talking to me but I was not paying any attention. They never expressed an opinion that I killed her but always said that they thought I knew who did it. Went back on lie detector. There several hours. Went on lie detector practically every night until statement was signed. Finishing lie detector *O'Neal got me two hamburgers and half pint of milk.* T at, outside of the coke, this was first food since arrested. It was late afternoon. Was then questioned by O'Neal. He said colored people were getting fired from their jobs and that the Governor had done something about paroles on account of this mess. That I was the cause of it. Said I was crazy. I told him I had been to several hospitals for treatment. Then Barton came in. He talked about the gun. Said he was going to take me out to the Burney home. Showed pictures to me of Mrs. Burney laying in bed. Stayed at State Police Headquarters up to 8:30 A. M. without going back to jail. Was questioned all night. Had no sleep. Nothing further to eat. O'Neal and Barton took me out—said they were going to Mrs. Burney's house but they didn't. Went up to a farm house on a high hill. Was handcuffed. Barton took them off and said "You're a nice boy and you are not going to run away." Major O'Neal went up to house and came around the house—was looking at him. Barton went up around the barn and came back in around the house with his hand on his gun and there was a twenty-five caliber

automatic laying in the seat, as if I was going to run. O'Neal said "You still here." I said "I wouldn't be though" and they started arguing. Captain Barton said "I left my gun here, didn't I?" They went driving on and out to the Burney house. Told them I did not remember the house. Went back to State Police Headquarters. There they showed me what they said were my finger prints on door of Burney house. They tilted the door and I grabbed it. Again questioned about the murder. Police took me out again—wanted me to show them where I had visited. I did so—three troopers—just went riding around Indianapolis. They talked about Mrs. Stout. Went back to State Police Headquarters. Again a lie detector for several hours. At the end wanted to know why they thought I killed Mrs. Burney and they said I was holding something back. Again wanted me to take lie detector. I said "I'm sick of it. If you've got any charge against me for first degree murder you file it." *Wouldn't take any more lie detector tests.* Took me out again to look for the cap. Took me around Mrs. Stout's home. Saw a lot of people searching for something. Was told they were searching for the gun. Knew where it was but would not tell them exactly where. They knew I had the gun from the time I was arrested up to the time I signed the statement. Tr. pp. 360, 375, Thursday morning, Tr. pp. 382, 388, 395, 398, 400, 403, Thursday night, Friday morning. Tr. p. 404. Friday, Tr. pp. 413, 414. 3rd time on lie detector. Tr. pp. 416, 417. Sat. morning. Tr. pp. 426, 428. Sat. afternoon—4th time. Tr. p. 432.

Only time I slept since the arrest was Sunday. Was in jail all Sunday and Sunday night. Was brought back to jail from State Police early Sunday morning. Sunday noon got bread and water. Slept on steel floor. No bed clothes. Left Monday morning. Don't know if to Burney place or State Police. Was then out all day and night. *Was not questioned all the time.* Had two apples to eat. Signed

statements that night. Was at State Police Headquarters. Tr. pp. 440, 442.

Major O'Neal showed me a part of a statement where 500 people were meeting at the Meridian Hill and as far as that was concerned I didn't care about that. He said they were getting impatient and they wanted to know before 4:30 was I going to confess that murder or they would have to do something about it. Said they were going to my house and take my wife and baby out of the house and "You'll never see them any more or hear from them any more."

Watts testimony after an interruption

Was told by the sheriff that I was in cell No. 7 because of the mob outside. He told me this days after I was out of cell No. 7. Asked for an attorney the second day I was in jail. Had no attorney prior to signing statements.

Never ate in county jail from time he was arrested until the statements signed. From time he was arrested—had coke—two sandwiches—pint of milk—after signing was given two sandwiches and milk—all he ate from the 12th to the 18th. No promise made to me prior to signing of statements that he would get life imprisonment—they merely hinted about it. They wanted me to have statements notarized but told them it was bad enough to lie—that he wouldn't swear to it. Tr. pp. 489, 491.

Cross Examination

After signing statement directed officer to where gun was. Had picture taken at location of gun. Identified same. Told them where to find—that same was not covered up. No one questioned me on Sunday. Signed the statements in presence of many witnesses. It is my signature on Exhibit No. 26—also on Exhibit No. 27. Betty Craeraft gave me the shotgun. She is Mrs. Stout. (Points her out.) She

sent me her picture in a letter signed by her. Talked to Fred Lynnes over at the grand jury. Talked with him by myself. Worked with him—he was a city employee. Was alone with him. Major O'Neal gave me cigars after and told Reasner to let me keep them. Took them back to jail and smoked them. That was the first night. I was questioned about the murder. Was never permitted to eat in corridor. At meal time was beaten up. While in the hole was beaten up with some instrument. Tr. pp. 504, 524, 527, 537, 556, 557.

Re direct

Never had visitors until after signing statement. Tr. p. 560.

Was discharged from the Navy. Received a bad conduct discharge September 12, 1944. Tr. p. 608.

Russell Webb testified that he was an inmate of the Indiana State Farm. Was confined in Marion County Jail on the 12th of November, 1947, and was there for some fifty-five days thereafter. Saw Watts when he came into jail. Was placed in cell No. 7. He was in No. 5. No. 7 is what is commonly called "the hole." Same as the others except no cots or bed in there and back end is closed where others have bars. There is a toilet in there, no drinking fountain. Deputy Sheriff said that anyone caught giving him food, water or cigarettes or papers would be put in there also. Said he was in there ten days. No place in that cell block to be fed. The other prisoners fed in dining room on third floor. Know nothing about what food Watts was fed—he just did not eat with us—saw him eat—ate the same as us when he was in cell No. 2. He ate in the big corridor. He had on overalls. He was taken out often. Tr. p. 450.

Cross Examination

We had cots in our cells. After Watts was there a few days he was permitted to be out in the corridor. No running water in any of the cells. Watts had had some trouble in jail with some guy. Don't know whether Watts ever had food or not—he never complained. Never saw him mistreated. When you come in and don't want to ruin your good clothes they give you overalls. Talked to him (Watts) while he was in No. 7—everyone did. No one prevented us from doing so. People could go right up and talk to him. Watts talked to me and others and never said anything about food. When he asked for water we got it for him, I or someone else, and we did anyone else who was in the hole. Tr. p. 465.

Questioned by court

Could see Watts at all times while he was in "the hole." He wore overalls. Saw him come and go from his cell. He walked out himself. He never was handcuffed when he came back into his cell. Gave him water there whenever he asked for it—perhaps some twelve to fifteen times. Saw other prisoners give him water—some twenty times—whenever he would stick his cup out. *He had visitors. He told me his wife came.* Tr. pp. 467, 472.

Re-direct

You could buy tobacco, as much as you had money to.

Re-cross

Watts did have tobacco. Some of his was stolen and a deputy gave him some, also some candy. He had cigarettes. He smoked in his cell. Don't know if he had candy in No. 7. Against the rules for relatives to bring any food to eat.

Alymar Watts. Am wife of the defendant. Had a phone

in the house. Recalls the day husband was arrested. My brother saw him brought in to jail. The sheriff had been out to the house inquiring about him so my brother went down to see what it was about. I visited him in jail. The night he was arrested I called the jail. Third or fourth day after, I called at jail but was told he was at State Police Headquarters. Went to sheriff's office at jail. Nothing said about returning. Visited him after he signed the statement. This was Wednesday. He looked as though he had no sleep and his eyes and face were swollen. Mr. Reasner first called at the house. Knew him. That night they came to house in search of shoes and shirt. Tr. p. 561.

Cross-examination

Police came out looking for shoes and shirt. They told me what they wanted and I invited them in. They got shoes and shirt. Knew that Wednesday was the only day for visiting at jail. When I went down they took Robert out into the sheriff's office where we talked. Hunted up lawyer after I learned he was in jail. Was looking for one. Didn't tell my husband I found one but I did. Didn't send him down as I understood they didn't allow nobody to come down and see him. Talked to lawyer—Mr. Newlin—white attorney. My husband asked me to get him a lawyer. Had lawyer Newlin. Didn't employ him. Whenever I would get ready for the lawyer. I knew I had one that would go on the case and therefore whenever I get ready to I would have him go on this case, but I didn't. I have employed Lawyer Henry since the trial. Husband came home around 10:00 o'clock the day he was arrested. Tr. pp. 571, 574, 577.

Examination by Court

Knew my husband smokes cigarettes, likes candy, but did not bring him any the day I visited him in jail.

Cross-examination

Sherman Lloyd. Was a prisoner in Marion County Jail on the 12th of November. Don't know if there was a bunk in No. 7 or not. Don't know how long he was in No. 7. Could have been less than three or four days. He was then placed in cell No. 2 which was opposite me. Saw him eating and smoking during period from November 12th to the 18th. He ate on the "downs," therefore food had to be brought to him. The crippled, those not trusted, mental, etc., ate on the "downs" and anyone in solitary ate there. That's on the first floor. They eat at same table where visitors come and talk. Same food served there as in main dining room. Any noise at night we could all hear it. If any disturbance in No. 7 we would have heard it. He had overalls over his good clothes at all times. He walked by himself, never needed any assistance. Never observed any marks on him. He never said anything about deputy sheriffs beating him up. If he had been beaten at night we would have heard of it. Talked to him several times while he was in No. 7, during the period of November 12th to the 18th. Never complained about food. *Know as a matter of fact he never missed a meal.* Know he always had food served. Saw empty trays or empty food vessels in the cell block. Cell No. 7 and No. 2 during November 12th to 18th. These two cells were occupied by Watts during that time. Never complained about not getting water—gave him water myself. He was out in the corridor for two days and nights and there got water for himself. Never given orders to refrain from talking to Watts. No orders not to give him cigarettes or candy. Tr., pp. 587, 590, 592.

Re-direct

After a few days in the corridor Watts was locked up in No. 2 and not permitted to get out. He made a very insult-

ing remark to one of the other prisoners about his wife. He said "For all you know I might have been out with your wife." He was a white man. He was then placed in No. 2. There I saw him eat candy.

Watts—Summary of Petitioner's Evidence

Arrested November 12, 1947—12:30 P.M. Placed in jail. Received no food or water in jail. From time of arrest to signing of statement, November 12th to November 18th, the only food or drink he had was a Coca-Cola, two sandwiches, glass of milk, no water. His clothes taken from him and given overalls to wear. At jail at meal times and at night just prior to going to State Police Headquarters would be beaten up by jail attendants with sharp instrument. Was taken from jail every night to State Police Headquarters and questioned. State Police would call in morning for trips in and about Marion County and for questioning. Would be at State Police Headquarters all night. Had no sleep from time of arrest to signing of statement. Was allowed to remain in jail Sunday, November 16th. Was abused—kicked—hit by State Police. One night for several hours all the State Police took turns beating him up. Major O'Neal of State Police used a black jack. Officers struck him in face, head and shoulders, also kicked him in side. At no time was he allowed to see visitors or talk to anyone, not even other prisoners. Asked for lawyers. State Police said there was a mob waiting for him and if he did not confess mob would harm wife and baby. Did say that this latter did not worry him and later said it did. That Mrs. Stout whom he was alleged to have attacked was a friend—she had sent him her picture in a letter, had given him a shotgun the morning of November 12th. It appears he knew personally the sheriff and many of his deputies as well as some of the state police. That he voluntarily took four lie detector tests and then refused

to take more. Likewise voluntarily went with state police, showing them where he had been on the 12th of November. November 13th told the state police about the gun.

Russell Webb—Inmate in jail at time Watts came in. He was placed in cell No. 7, known as "the hole." No bed or cot in there. He ate in the big corridor—wore overalls. He never complained about food. Never saw him mistreated. Talked to Watts when he was in cell No. 7—everyone did. People could go right up and talk to him. We all gave him water. He did have visitors. He said his wife had visited him. He did have tobacco—you could buy all you wanted. Saw deputy sheriff give him cigarettes and candy. Watts did smoke in cell No. 7, "the hole."

Alymar Watts—wife of Petitioner.

My brother was at jail when he was brought in. Called jail the night of November 12th. Was told husband was at State Police. Contacted white attorney, Mr. Newlin, the next day. Wanted to have one when I thought it was necessary. Three days later visited and talked to husband at jail. Employed lawyer Henry the day of trial.

Sherman Lloyd: Inmate in jail at time Watts brought in. Was placed in cell No. 7. Saw him eating, smoking November 12th to 18th. Never any disturbance in the cell. If there had been would and could have heard it. He wore overalls over his good clothes. Never saw any marks on him. Never complained about food or said he had been beaten up. Talked to him often while he was in No. 7. He knew of his own knowledge Watts never missed a meal. Gave him water. Watts was out in corridor two days and night and got his own water.

Testimony of State's Witnesses

Robert Reasner: Arrested Mr. Watts November 12th at 2:40 P. M. Took him to the Marion County Jail. He was placed in solitary confinement in cell No. 7. During period from the 12th to the 18th Watts was also placed and kept in cell No. 2. He was moved from No. 2 to No. 7 the second day after his arrest. There were four bunks in cell No. 2. He had the privilege of sleeping on any one of them. Watts was fed in the jail. The exact dates witness couldn't tell but did know he was fed on the 12th. He was fed then in cell block No. 7. Also know that he was fed in cell block No. 7 on the 13th of November. Other dates do not have any knowledge. Could have been fed and would not have known it. During period from the 12th to the 18th of November 1947 was present with the defendant at State Police Headquarters in the evening. Was present at State Police Headquarters during the questioning on every day that Watts was questioned. He was first questioned on the 12th at 12:00 o'clock the night of his arrest. Was present with Watts at State Police Headquarters Thursday, Friday and Saturday nights. Likewise the following Monday night. Watts did eat at State Police Headquarters, Thursday and Monday nights know about in particular. On Thursday night sandwiches were brought for Robert Watts and saw him eat them. He ate two. They were tenderloin sandwiches. He also had other sandwiches and milk. At no time in his presence did anyone strike or hit Watts nor did anyone threaten him. No statements or promises were made to him to induce him to sign any papers. Did not tell him nor did anyone else tell him in his presence that a mob was forming which might harm him or members of his family if he did not sign a confession by 4:00 A.M. on a particular day. Did not hit him nor did not see anyone hit him with a slapperjack. Don't own one. No one hit

him in his presence with his fist, causing his nose to bleed. Saw Watts sign State's Exhibit 28. Sgt. Shields of the State Police wrote same. Shields received his information to write from Robert Watts. Was present at the time. Was present when Watts signed the exhibit. The signature is that of Robert Watts. State's Exhibit No. 26 was later typed. Exhibit No. 28 is the typed copy. The signature thereon is Robert Austin Watts'. He signed same in front of him. After signing same Watts talked to the prosecutor. Heard conversation between prosecutor and Watts. Prosecutor had conversation dictated to stenographer. Same was reduced to writing, Exhibit No. 27 is what Watts told the prosecutor. The signature thereon is that of Robert Austin Watts. He signed same in my presence. Watts had asked to see the prosecutor alone. They called the prosecutor. No inducement was ever made to Watts to sign this statement nor any promises made to him, nor were any threats made to him. He was never struck in any manner. Watts was removed from the county jail to State Police Headquarters because they didn't have any private questioning room in the county jail. Cell block No. 7—solitary confinement—is used for different purposes—unruly prisoners—Watts was an unruly prisoner on the first night he was put in there. There is nothing to sleep on in cell No. 7. The night of his arrest he was taken to State Police Headquarters about 11:30 P.M. It was between the hours of 6:00 and 11:00 that we learned of the murder of Mrs. Burney and during that time were investigating same. Took Watts out to State Police Headquarters to question him about this murder. Told him why and what we wanted to talk about. He remained at State Police Headquarters until about 2:30 A.M. That night he and Shields talked to Watts. Watts had been given opportunity to sleep the first night from 2:30 P.M. until midnight and had opportunity every day in the jail to sleep. Watts was not in

cell block No. 7 every day. He was taken out after the second day. Talked to Watts in cell block No. 2 several times. Never told Watts that he was just a poor police officer trying to make a living. Tr., pp. 729-754.

On the night of the day he was arrested Watts said that he went to work at 7:00 o'clock, took a load of employees to University Heights. Later picked up a man by the names of Bill who had a shotgun, then went to the home of Mrs. Pooley, knocked on the door, said he had a load of gravel. She said it didn't belong to her. He was permitted to use the phone. That the lady had on a red bathrobe and that her leg was exposed. She went to the bedroom to dress. He peeked into the bedroom. This lady was standing there without any clothes on. She screamed when she saw him and he ran out. From there he went to the home of Mrs. Pike and went in there and asked her if she had ordered the load of gravel. She let him use the phone. They struck up conversation. Mrs. Pike said they were just building a home and all the money they had was in it. He felt sorry for her and never bothered her. From there he went to the home of Mrs. Stout and on the same pretext gained admittance. She granted permission to use the phone. Mrs. Stout went into her bedroom. Watts requested Mrs. Stout to write a receipt on a piece of paper that he had called. She turned to write this note and he grabbed her and picked up a butcher knife. He said she begged him not to use the knife. She would do what he asked if he would not use the knife. He then made her disrobe, but Mrs. Stout plead with him, telling him what she had done for his sake. Mrs. Stout said she was expecting guests and that the back door was unlocked. He thought it should be locked. She went to lock the door but instead ran out and slammed the door. He left the house and drove away in the truck. Tr. pp. 808-812.

Statement of Watts pertaining to Harriett Stout was

reduced to writing Thursday night, November 13th, and was signed by Watts. Exhibit No. 29 is said statement and that is Robert Austin Watts' signature. Tr. p. 813.

Howard Hyslope, witness for State.

I first saw the defendant November 14, 1947 at the Marion County Jail; about 2 o'clock in the afternoon with the defedant, visited several residences in Marion County that he directed us as places where he had either entered the house or attempted to enter. We were with him approximately four hours. During that time there were no threats made against him whatsoever and none of us struck him. He had nothing to eat during that time. Upon our return to State Police Headquarters at approximately 5:30 one of the officers went out and got some sandwiches and milk and I saw him eat two sandwiches. He had eaten at approximately 6 P. M. I was in his presence from about 7 P. M. until about 3 A. M. the next morning. The questioning was interrupted. He was given breathing spells which varied from 10 to 15 minutes. There were 4 or 5 such breathing spells during that time. There was no officer who struck Mr. Watts during that time in my presence and no threats were made against him to my knowledge. I was again in his presence on November 17th. We were gone approximately 4 or 5 hours. Watts directed us the route that he had driven on November 12th. After we returned to State Police Headquarters he had sandwiches and drank some milk. While we were on the trip the occupants of one of the houses gave us some apples and we in turn gave Watts two of them which he ate. No one struck the defendant in my presence that day. I saw no marks of violence upon him either of the days I was with him. During the times I observed him he appeared to walk normal to me. (Petitioner's Brief, Vol. 2, pages 73-75). Tr. pp. 608-624.

The defendant was not questioned for more than an hour at a time without being given a breathing spell, after which the questioning was resumed. (Petitioner's Brief, Vol. 2. p. 78).

Robert O'Neal, witness for State.

I am a State Police Officer of the State of Indiana and am a Major and Executive Officer of the department. I saw the defendant at State Police Headquarters between November 12th and 18th on various days at least once each day except Sunday. I was present when the defendant signed State's Exhibit No. 26. Prior to that time I did not at any time strike the defendant. No one in my presence struck the defendant. I never at any time shoved his head against the wall nor no one in my presence did that. No threat of any kind was made by me or anyone in my presence, neither was any promise or inducement made to the defendant to induce him to sign that paper. The appearance of the defendant had not changed at the time he signed that paper from the time when I had first seen him. The first time I saw him was on Thursday evening around 6 o'clock in Captain Barton's office and at that time I personally bought and paid for some sandwiches and a piece of candy and some milk, which he ate while I talked to him in Captain Barton's office. He drank many cokes at various times. On an occasion I remember seeing Shields bring in a sack containing many tenderloin sandwiches. I also recall Captain Barton giving him some sandwiches. I recall at least three times that he was provided food at State Police Headquarters, other than the times when he was given cigarettes, cokes and candy. I did not at any time see Captain Barton strike the defendant. At the time he signed the statement he was not handcuffed. I did not tell Robert Watts that there was a mob forming to do him any harm. As near as I could determine the statement was

signed by the defendant voluntarily. (Petitioner's Brief, Vol. 2, pages 83-85). Tr. pp. 658-697.

I saw the defendant after midnight at intermittent times at the same place. After midnight Shields and Reasner questioned the defendant. The questioning went on for four or five days at different times. During the rest periods he lolled around in some of our soft chairs. There was no pressure put on him at all. He was usually brought to our office about the same time every evening, along about 5 or 6 o'clock. At no time was he required to stand up longer than 20 minutes or half an hour. There was no pressure used on him at any time during the questioning. (Petitioner's Brief, Vol. 2, pages 87-88.)

I did not shove or push the door in any way so that it would fall towards or slide towards the defendant Watts, when we were in the laboratory. I was never outside of State Police Headquarters with the defendant at any time before he signed the confession. (Petitioner's Brief, Vol. 2, p. 90.)

Watts was returned to the county jail every morning about two or three A. M. No pressure was ever placed on Watts. He talked incessantly. We definitely couldn't stop him. Cross-examination testified that on Thursday night talked to Watts about his family, about his time in service, about his visits around this section of the country visiting in these homes. He said that he had been around the doors of several homes. He said he was a member of a large family and his father was in Cleveland. That he had gone to Cleveland for a medical condition one time because of his medical condition. As to this condition—he said he had these notions to attack white women and he went to Cleveland to see a doctor to see if it could be corrected. He stated these things toward the end of our conversation the first night. (Tr. pp. 673 and 674.)

There was some talk on the first night about his wife. I asked him at one time—I can't identify the night—why his wife hadn't been to see him—if they were mad or something and other than that I don't recall any conversation about his wife. Someone told me that his wife or family hadn't ever been to the jail to make inquiry about him and I asked him why that was, was his wife and family mad at him and he told me he supposed his wife was disgusted with him or something. He never did ask to talk to his wife over the telephone. In the same conversation about his wife I thought it was peculiar that someone hadn't been to the jail to inquire about him. I asked him why he didn't have a lawyer. I was curious about that myself. I felt that he should have one. He never did telephone his wife nor anyone else did in my presence. (Tr. pp. 694-696.) At no time was there any pressure put on this man.

John Barton, witness for State.

I am Captain of Detectives of State Police Department of Indiana. I saw the defendant, Robert Watts, between November 12th to November 18th, 1947, at State Police Headquarters. I saw him every day during that time except Sunday. I took part in questioning him during that time and Thursday, Friday and Saturday nights. During that time I made no promises to him whatsoever in regard to his signing of any statement or confession. At no time did I strike him or hit him in the face with a slapper jack or with my fist. At no time did I kick the defendant in the side and during the times that I was present no one hit, struck or threatened the defendant and I did not make any threats against him myself. I did not at any time tell the defendant there was a mob forming which might harm him or any member of his family. At no time did Major O'Neal and I take the defendant to a secluded spot in Marion

County, remove his handcuffs and leave a 25 automatic gun in the back seat beside him and leave the car. I remember that the defendant had some sandwiches at State Police Headquarters on Thursday night. The defendant was seated at all times I was talking to him with the possible exception of one time Friday he was talked to for a short time while he was standing. The defendant signed State's Exhibit No. 28 early Tuesday morning and I also signed it as a witness. The defendant also signed State's Exhibit No. 26 and I also signed it as a witness. The defendant also signed Exhibit No. 27 and I also signed it as a witness. The defendant signed each of those statements voluntarily. I, or no one in my presence, made any promise to induce the defendant to sign those exhibits. I made no statement or threat to him that would cause fear to induce him to sign the statements nor no one in my presence. (Petitioner's Brief, Vol. 2, pages 91-93.) Tr. pp. 697-727.

Harriett Stout: After testifying to attack made on her by petitioner Watts she said that her maiden name was Harriett Cracraft. That she had never seen Watts prior to November 12th. That she had never written any letters to him, that such a question is utterly revolting, nor had she ever sent him a picture of herself in W. A. C. uniform with a dog. Saw him at the county jail. Sheriff Magenheimer was present. Said that that was the man. Tr. pp. 653-657.

William E. Stockdale, Direct Examination.

I live in Indianapolis, I am in charge of feeding the prisoners in the Marion County Jail. He was fed the same food as the other prisoners. He was fed three times a day. On the first afternoon that he was there at about 2:30 or 3 o'clock he was fed and again at 4:30 that evening. That afternoon the defendant was not served in cell No. 7 but was

fed out at a table on the outside of the cell block. The defendant was late at the 4:30 meal upon a couple of different times and would be as much as two hours late before he was fed upon those particular occasions. (Petitioner's Brief, Vol. 2, p. 253.) Tr. pp. 1911-1918.

Albert Southard, Direct Examination.

I am Commissary Officer of the Marion County Jail. During the time Robert Austin Watts was in the county jail, between November 12th and November 18th, 1947, I received from the defendant $23.91 and during this time the defendant used this money for the purchasing of cigarettes, candy, cakes, and various other items that we have in the Commissary. All of that sum was spent for those items except $4.00 which he had sent out of the jail. (Petitioner's Brief, Vol. 2, p. 254.) Tr. pp. 1919-1922.

Al Magenheimer, witness for the State, testified that Watts was fed and was allowed in corridor after second day. That both his wife and mother visited him—saw him every day, and there were no signs of beating. Watts told him he didn't want a lawyer. Was taken out of cell block No. 7 after two days. Tr. pp. 1875-1902.

Harry Foxworthy, State's witness, testified that when Watts was brought to jail after having been arrested on November 12th, he had bruises and scratches on his body and face and had been bleeding, but marks were gone by next day. Tr. pp. 1863-1869.

Watts testified that he served thirty days at the Indiana State Farm for "prowling." Tr. pp. 1587-1614.

Conclusion

That the burden of proof was not successfully borne by the petitioner. On the contrary, the evidence is clearly in favor of the conclusions reached by the Supreme Court of the State of Indiana.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of the State of Indiana should be sustained.

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Summary of Argument

It is claimed by petitioner:

First, that the court erred in affirming the conviction of petitioner, a negro, based upon an indictment returned by a grand jury from which negroes had been systematically excluded solely because of race and color, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Second, that the court erred in affirming the conviction of petitioner based upon confessions obtained by state officers through the use of force, duress and intimidation, in violation of the Due Process Clause of the Fourteenth Amendment.

It is the contention of the state that the burden of proof in both instances was upon the petitioner. We further maintain that the burden of proof was not successfully borne by the petitioner. That the evidence in both questions is clearly in favor of conclusions reached by the trial judge and the Supreme Court of Indiana, to-wit: that there was no systematic attempt to exclude negroes from the grand jury—that there was no proof of a systematic effort to exclude negroes from jury service—that the signed statements of petitioner were not obtained by state police through the use of force, duress and intimidation.

One witness, Glenn Funk, testified that within the past two years he knew of two negroes who were drawn as members of a jury in the Marion County Criminal Court but they did not serve. Another witness, Judson L. Stark, the Prosecuting Attorney, testified that the drawing was regular and that names are selected for jury service without regard as to whether they are white or colored; that there were three negroes called on the grand jury venire within the last three years. Another witness, Glenn W. Parish, deputy clerk, testified that no discrimination was shown in

selecting names to go into the jury box, that there are many colored persons' names in the box, and that he had seen the names of colored persons drawn from the box and selected. Several witnesses testified that they had no knowledge of a negro ever having served on the grand jury, but none of these witnesses testified to any facts nor did they testify that they were in a position to know. We submit that this is no proof of a systematic effort to exclude negroes.

Out of the presence and the hearing of the jury the trial court accorded a full hearing on the question of whether the statements were obtained by police through duress and intimidation and the use of force. The petitioner's evidence was to the effect that he was not guilty; that prior to his confession he had been beaten, starved, threatened and otherwise abused to such an extent that he signed his confession under the influence of fear. This evidence was contradicted in detail by the testimony of various competent witnesses who testified for the State. We have no quarrel with the petitioner as to the law. We differ as to the application of the law to the facts. The evidence in this case definitely bears out that the statements were not obtained by duress, intimidation or the use of force.

The petitioner's question on grand jury was presented by a Motion to Quash. Under Indiana procedure this question can not be raised by a motion to quash. Any irregularity in the selection, impaneling or swearing of a grand jury must be raised by a plea in abatement. A motion to quash in an indictment only reaches the matters apparent on the face thereof.

We submit, therefore, that petitioner has presented to this Court no federal question.